

STATE OF VERMONT

PUBLIC SERVICE BOARD

Petition of VTel Wireless, Inc., pursuant to 30)

V.S.A. § 248a, for a Certificate of Public Good)

To install a telecommunications facility at Bayne) Docket No. _____

Comolli Road, Calais, Vermont

MOTION TO DISMISS PETITION

NOW COMES the Town of Calais Selectboard (“the Town”), by and through

its counsel Stitzel, Page & Fletcher, P.C., and hereby requests that the Public

Service Board (“Board”) dismiss Vtel Wireless, Inc.’s (“Petitioner”) deficient Petition

filed in the above-captioned docket. For the reasons discussed herein, the Petition

is incomplete as it lacks sufficient information to satisfy the applicable criteria

under 30 V.S.A. § 248a and fails to substantially comply with the Public Service

Board's rules. Moreover, dismissal is warranted because Petitioner failed to

provide the Town with the 45-day notice required under § 248a(e).

Memorandum

Petitioner has requested that the Board issue a Certificate of Public Good for

Petitioner's proposed wireless telecommunications facility to be developed at 1056

Bayne Comolli Road in Calais, Vermont, on property owned by Steve Perkins (“the

Project”). *See* Item 1 of Petitioner’s Petition filed on May 15, 2015 (“the Petition”).

Petitioner's filing with the Board is deficient for three reasons. First, the Petition

does not contain sufficient information to satisfy the criterion in § 248a(c)(1) that

the Project will not have undue adverse effect on historic sites. Second, the Petition fails to demonstrate that the Project qualifies as a telecommunications facility “of limited size and scope” and does not contain sufficient information to satisfy the criteria identified in § 248a(c)(1) which the Board must consider in its review of larger facilities. Third, the Petition does not identify the location of all necessary Project elements, including the municipal curb cut permit required to complete the Project. In addition to the deficiencies in the Petition itself, the 45-day notice provided to the Town was deficient as it was provided to the Town less than 45 days prior to the Petitioner’s filing of the Petition with the Board. The Town respectfully requests that the Board dismiss the Petition based on these deficiencies.

I. Petition Includes Insufficient Historical Sites Analysis

The Petition fails to contain sufficient information to satisfy the criterion in § 248a(c)(1) that the Project will not have undue adverse effect on historic sites. Petitioner’s Project Narrative (Item 6B.1 of the Petition) indicates on page 6 that the Project is “not expected” to have an undue adverse impact on historic sites. The evidence Petitioner submits to support a positive finding under the historic sites criterion, the Draft NEPA Screening Report from A&D Klumb Environmental (Item 6B.9 of the Petition) includes the express disclaimer that “[t]his is a DRAFT report and conclusions have not yet been drawn.” It states that the “potential impacts to National Register of Historic Places listed and eligible properties is still under

review” and that the “effects on Indian Religious Sites is still under review.” The Petition should be dismissed as incomplete for failure to contain sufficient information to satisfy the criterion that telecommunication facilities not have an undue adverse effect on historic sites. *See* § 248a(c)(1).

**II. Project is Not of Limited Size and Scope and Petition Includes
Insufficient Evidence on Criteria Applicable to Larger Facilities**

The Petition also fails to demonstrate that the Project qualifies as a facility “of limited size and scope,” as the Petitioner cannot conclusively state that the Project will not disturb more than 10,000 square feet of earth. *See* § 248a(b)(3)(B). Because the Petition does not contain sufficient information to satisfy all of the criteria identified in § 248a(c)(1) that the Board must consider in its review of larger facilities, to wit, 10 V.S.A. §§ 1424a(d) and 6086(a)(1) through (8) and (9)(K), it should be dismissed as deficient.

A. Description of the Project

Petitioner’s Project Narrative (Item 6B.1 of the Petition) indicates that the Project will include a 140’ tower and create a total of approximately 9,900 square feet of “permanent earth disturbance.” The tower is to be located in a 20’ x 20’ fenced-in gravel compound containing or surrounded by a fence. There will also be a 12’ x 285’ access drive leading from “a new curb cut” off Bayne Comolli Road to a 10’ x 575’ wide woods trail that reaches the 20’ x 20’ gravel compound. Armored cable will carry electrical service over the ground from an existing utility pole for

120' and then be placed underground following the access drive for 480' until it reaches the gravel compound.

Petition's Detailed Site Plan (Pages 4 and 5 of Item 6B.2) provides different specifications in terms of the access drive or road than the Project Narrative does—the "Access Drive Notes" on Page 5 indicate that "ALONG THE WOODED AREAS OF THE ACCESS ROAD, THE WIDTH MAY BE TEMPORARILY EXPANDED AS NECESSARY FOR EQUIPMENT ACCESS" with the "MAXIMUM WIDTH TO BE 15'." From the various terminology used on the Detailed Site Plan, it is not clear whether the expansion to 15' will only occur within what the Petitioner refers to as the 575' long "woods trail" or will extend beyond that to the 285' long "access drive." Further complicating the description of the access drive or road is a statement by Petitioner's Project Manager in an April 2, 2015 letter included as Page 21 of Item 6B.9 of the Petition that "[a]ccess to the site will be via an upgraded gravel woods road approximately 575 feet long from the property owner's driveway off of Bayne Comolli Road." (emphasis added). This statement implies that the access drive or road will begin at the property owner's driveway rather than a "new curb cut" off Bayne Comolli Road. Additionally, the Detailed Site Plan (on Page 4 of Item 6B.2), in conjunction with the Construction Details 2 (Page 9 of Item 6B.2) illustrate the underground burial of the armored utility cable involving significant earth disturbance along much of the woods trail rather than the 285' long "access drive."

Finally, the Notes associated with the Petition's Site Plan (Page 7 of Item 6B.2) refer to additional "PARKING AND TURNAROUND AREAS," which are neither discussed in the Project Narrative nor shown on the Site Plan and for which dimensions are not provided.

B. Petition Fails to Demonstrate That the Project Qualifies as a Facility of Limited Size and Scope

Section 248a(b)(3) defines a project of limited size and scope as one whose construction does "not disturb more than 10,000 square feet of earth" with "disturbed earth" being defined as "exposure of soil to the erosive effects of wind, rain, or runoff." The Board's Second Amended Standards and Procedural Order¹ clarifies that "[i]n order to qualify as a project of limited size and scope, construction of the project shall not result in earth disturbance of more than 10,000 square feet of earth, excluding temporary earth disturbance associated with construction activities."

Combining the following elements of Petitioner's Project yields a base calculation of 9,570 square feet of earth disturbance: the 20' x 20' gravel compound (400 square feet), 12' x 285' access drive (3,420 square feet), and the 10' x 575' woods trail (5,750 square feet). This calculation does not include the area over which the access road will be expanded at times to allow for equipment access, the

¹ *Second Amended Order implementing standards and procedures for issuance of a certificate of public good for communications facilities pursuant to 30 V.S.A. § 248a*, Order issued September 5, 2014.

maximum possible square footage of which would add either an additional 5' x 575' (2,875 square feet) if the expansion is limited to the woods trail or 2,875 square feet plus another 3' x 285' (774 square feet) for expansion of the access drive. Even if the areas over which expansion will occur at times will be limited to the woods trail, the square feet of possible earth disturbance is 12,445, well beyond the 10,000 limit. Because the expansion will be associated with vehicle access of the tower and compound, rather than an exempt construction activity, it is included in the earth disturbance calculation.

Additionally, not yet taken into account in this calculation is the square feet of earth disturbance that will result from creation of the parking and turnaround areas, from alternative locations for the curb cut off Bayne Comolli Road, or from the armored electric cable that will extent on the ground for 120'. The inclusion of these three elements of the Project would also likely cause the Project to exceed the 10,000 square foot limit for earth disturbance and prevent the Project from qualifying as one of limited size and scope.

The dimensions and location of the parking and turnaround areas are unidentified by Petitioner, although the necessity of a turnaround is clear from its inclusion in other telecommunication facility projects, *see, e.g.*, Final Orders of the Board in Dockets 8407, 8160, and 8079, and from the need for vehicles accessing the tower and compound to avoid traveling in reverse on the single-track woods

trail. Further, the Town is not aware of a municipal curb cut permit authorizing Petitioner to complete the “new curb cut” Petitioner proposes off Bayne Comolli Road to access the Project. *See Exhibit A, Affidavit of Donna Fitch*, attached and incorporated herein. Until the Selectboard issues such a permit under the Town’s Curb Cut Ordinance, a copy of which is attached as Exhibit B and incorporated herein, the accurate length and location of the access drive cannot be identified. The curb cut application may be denied or the curb cut may have to be located elsewhere to satisfy the requirements of the ordinance, lengthening the access drive and adding to the amount of total earth disturbance. From conflicting information in the Petitioner’s April 2, 2015 letter included as Page 21 of Item 6B.9 of the Petition, it is also not clear whether the Petitioner intends on, or is considering, extending the access drive from Steve Perkins’ driveway rather than a “new curb cut” shown on the Detailed Site Plan. This would also change the configuration of the access drive. Finally, it is not clear whether the armored electric cable will cause earth disturbance in the 120’ that it travels on the ground.

Turning to Petitioner’s stated estimate of approximately 9,900 square feet of earth disturbance, there is no indication that Petitioner has taken into account the 15’ expansion of the woods trail and/or access drive, the parking and turnaround areas, the possible alternative locations of the new or existing curb cut that will be used to access the Project, or the above-ground armored electric cable. Any one of

these elements could easily create earth disturbance in excess of 100 square feet. It is also unclear how Petitioner has arrived at the 9,900 square feet estimate from the information supplied in the Petition. What is clear is that the Petitioner has not met its burden to shown that the Project will result in less than 10,000 square feet of earth disturbance; thus the Project does not qualify as a facility of limited size and scope.

**C. Petition Includes Insufficient Evidence on Criteria Applicable to
Larger Facilities**

For projects not of limited size and scope, the Board must make positive findings under all of the criteria in § 248a(c)(1), including those criteria from 10 V.S.A. §§ 1424a(d) and 6086(a)(1) through (8) and (9)(K). Because Petitioner is proceeding as if its Project is of limited size and scope, the Petition fails to address many of the necessary criteria for larger facilities. Specifically, the Petition fails to address the following criteria from 10 V.S.A. § 1424a(d):

- (1) existing water quality and current water quality classification.
- (2) the presence of aquifer protection areas.
- (3) the waters' value in providing temporary water storage for flood water and storm runoff.
- (4) the waters' value as fish habitat.
- (5) the waters' value in providing or maintaining habitat for threatened or endangered plants or animals.
- (6) the waters' value in providing habitat for wildlife, including stopover habitat for migratory birds.
- (7) the presence of gorges, rapids, waterfalls, or other significant geologic features.
- * * *
- (10) the presence of known archeological sites.

(11) the presence of historic resources, including those designated as historic districts or structures.

(12) existing usage and accessibility of the waters for recreational, educational, and research purposes and for other public uses.

(13) studies, inventories and plans prepared by local, regional, statewide, national, or international groups or agencies, that indicate the waters in question merit protection as outstanding resource waters.

(14) existing alterations, diversions or impoundments by permit holders under State or federal law.

The Petition also fails to address the following criteria from 10 V.S.A. § 6086(a)(1) through (8) and (9)(K):

(1) Will not result in undue water or air pollution. . . .

(4) Will not cause unreasonable soil erosion or reduction in the capacity of the land to hold water so that a dangerous or unhealthy condition may result.

(5)(A) Will not cause unreasonable congestion or unsafe conditions with respect to use of the highways, waterways, railways, airports and airways, and other means of transportation existing or proposed.

(B) As appropriate, will incorporate transportation demand management strategies and provide safe access and connections to adjacent lands and facilities and to existing and planned pedestrian, bicycle, and transit networks and services. . . .

(9) . . . (K) Development affecting public investments. A permit will be granted for the development or subdivision of lands adjacent to governmental and public utility facilities, services, and lands, including, but not limited to, highways, airports, waste disposal facilities, office and maintenance buildings, fire and police stations, universities, schools, hospitals, prisons, jails, electric generating and transmission facilities, oil and gas pipe lines, parks, hiking trails and forest and game lands, when it is demonstrated that, in addition to all other applicable criteria, the development or subdivision will not unnecessarily or unreasonably endanger the public or quasi-public investment in the facility, service, or lands, or materially jeopardize or interfere with the function, efficiency, or safety of, or the public's use or enjoyment of or access to the facility, service, or lands.

The Petition should be dismissed as incomplete for failure to provide sufficient information for the Board to reach a positive finding under all of the criteria that it must consider in its review of larger facilities.

III . Project Lacks Necessary Elements

As described above, the Petition fails to identify the location of necessary elements of the Project. These include identification of where the 15' expansion will occur along the woods trail and/or access drive, the location of the parking and turnaround areas, and the location of an existing curb cut that will be used to access the Project. Because the Petition lacks these elements, the Project is not in a complete, final state and is not ready for review.

Additionally, pursuant to the Board's Second Amended Standards and Procedural Order for § 248a facilities, an applicant must provide copies of "any relevant local or state permits (including Act 250 and municipal zoning permits) that relate to the facility." The Board must give due consideration "to all conditions in an existing State or local permit" and "harmonize the conditions in the certificate of public good with the existing permit conditions to the extent feasible." § 248a(d).

As stated above, the Town is not aware of the existence of a municipal curb cut permit authorizing Petitioner to complete the "new curb cut" Petitioner proposes off of Bayne Comolli Road to access the Project. *See* Exhibit A. Petitioner has not submitted such a permit with its Petition. Petitioner, in fact, fails to

recognize that it needs such a permit, stating in the Project Narrative (Item 6B.1 of the Petition) that “[b]ased on its due diligence and discussions with the property owner, the Property is not subject to any state or local land use permits that relate to or affect the proposed Facility.”

To the contrary, curb cut permits must be acquired from the Selectboard for any new access proposed to a Town right-of-way that is a Class 2, 3, or 4 road. *See* Exhibit B, § 3. Bayne Comolli Road is a Class 3 Town road and right-of-way, and thus a curb cut permit is required from the Selectboard before completion of a new access to the right-of-way. *See* Exhibit A. Curb cut permits are also required under the ordinance when an applicant seeks to change the use of an existing curb cut, *see* Exhibit B, § 3, which Petitioner’s April 2, 2015 letter, included as Page 21 of Item 6B.9 of the Petition, suggests Petitioner may have in mind.

Regardless of Petitioner’s plan for creating access to the Project, no curb cut permit has been submitted with the Petition, and without that permit, the Project is not final and cannot be reviewed in full. The lack of submission of curb cut permit approval makes the Petition incomplete under Board’s Second Amended Standards and Procedural Order and prevents review of the Project under § 248a(d). The lack of the submission of a permit also prevents the length and location of the access drive from being identified.

The Petition should be dismissed as incomplete as is not final and cannot be reviewed in full.

IV. Petitioner Failed to Provide 45-Day Notice

Section 248a(e) requires that “[n]o less than 45 days prior to filing an application for a certificate of public good under [§248a], the applicant shall serve written notice of an application to be filed with the Board . . . to the legislative bodies and municipal and regional planning commission in the communities in which the applicant proposed to construct or install facilities.” It also requires that “at least one copy of each application shall be filed with each of these municipal and regional planning commissions.” The Board’s Second Amended Standards and Procedural Order provides further details on the 45-day advance notice:

The notice [for projects other than de minimis modifications] shall state that the applicant intends to make a § 248a application, identify the location of the telecommunications facility site(s) and provide a description of the proposed project(s), including a description of the amount of any clearing proposed for the project(s). In addition, the notice must contain sufficient detail about the proposed project(s) to allow the parties receiving the notice to understand the impact of the project(s) on the interests of those parties. . . .

(emphasis added).

On February 25, 2014, the Town received in the mail from Petitioner a document with a Table of Contents indicating that it was submitted February 25, 2015 and that was characterized as a “45-Day Notice” (“the February Notice”). *See Exhibit A.* A copy of the February Notice is attached as Exhibit C and incorporated

herein. The February Notice includes drawings for a project entirely different from the Project ultimately proposed to the Board in the pending Petition. *Compare* February Notice *with* Item 6B.2 of the Petition. The project described in the February Notice is in an entirely different location on Steve Perkins' property, involves only a 120' tower, and has different access.

On April 6, 2015, the Town received in the mail from Petitioner a document with a Table of Contents indicating that it was a supplement to the February Notice, stating that the document was "Supplemented April 3, 2015" ("First April Notice"). *See* Exhibit A. A copy of the First April Notice is attached as Exhibit D and incorporated herein. The First April Notice indicates that it includes a "Revised Prefiling Narrative," but no narrative is included. *See* Exhibits A and D.

On April 14, 2015, the Town received in the mail from Petitioner a document with a Table of Contents indicating that it was a supplement to the First April Notice, stating that the document was "Supplemented April 14, 2015" ("Second April Notice."). *See* Exhibit A. A copy of the Second April Notice is attached as Exhibit E and incorporated herein. The Second April Notice includes no narrative. *See* Exhibits A and E.

Petitioner subsequently filed this Petition with the Board on Friday, May 15, 2014, and it was received by the Town on Monday, May 18, 2015. *See* Exhibit A.

The Town did not receive an accurate application, identification of the location of the Project, or description of the Project 45 days in advance of Petitioner filing this Petition. A change in the location and design of a project creates an entirely new project because the specific location and design are what is analyzed under the substantive criteria of § 248a. Thus, the February Notice cannot operate as a 45-day advance notice for the Petition.

Turning to the First April Notice, no description of the proposed facility was included in the notice, and the Town was not provided sufficient detail about the proposed project to understand the impact of the project on its interests. Thus, the First April Notice is deficient under Board's Second Amended Standards and Procedural Order and cannot operate as a 45-day advance notice for the Petition. Finally, the Second April Notice also failed to include a description of the proposed facility and is similarly deficient under Board's Second Amended Standards and Procedural Order and cannot operate as a 45-day advance notice for the Petition.

Even if the First April Notice were to have included a narrative of sufficient detail to constitute notice to the Town of the Project, any way the dates are calculated, the Town did not receive the full 45 days time provided to it by statute to complete a thorough review of the Project and the Project's impact on the Town's interests relevant to the criteria under which the Board will review the Project.

The timeline is shy of 45 days when the date on the First April Notice and the date

the Petition was filed with the Board are used (i.e., 42 days). The timeline is shortest when the Town's date of receipt of the First April Notice is used in the calculation (i.e., 39 days)

The analysis of the Board in numerous § 248a proceedings indicates that the Board expects intervening parties to submit technical evidence during the 21-day period after the filing of a § 248a petition to enable the Board to conclude that a project raises a significant issue under the criteria contained in § 248a(c)(1). *See, e.g., Petition of VTel Wireless, Inc., Docket 8437, Order of February 26, 2015; Petition of VTel Wireless, Inc., Docket 8359, Order of October 23, 2014.* Without a full 45 days in addition to a full 21 days following receipt of the complete petition, the hiring of experts by municipalities, completion of technical reports by those experts, and compilation of the conclusions and evidence, is unrealistic and puts extreme strain on municipal resources. Even a notice that is a few days shy of the 45 days can impact a rural municipality whose municipal office may only be open a few days a week and thus will only receive mail on those days.


Dismissal of the Petition is warranted here for failure of the Petitioner to provide the Town with a 45-day advance notice that meets the requirements of § 248a(e) and the Board's Second Amended Standards and Procedural Order.

Conclusion

For the foregoing reasons, the Town respectfully requests that the Public Service Board ("Board") dismiss Vtel Wireless, Inc.'s ("Petitioner") deficient Petition filed in the above-captioned docket for incompleteness in terms of lack of sufficient information to satisfy the applicable criteria under 30 V.S.A. § 248a, failure to substantially comply with the Public Service Board's rules, and failure to provide the Town with the 45-day notice required under § 248a(e).

Dated at Burlington, Vermont this 5th day of June, 2015.

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